UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Sheldahl, Inc.	Chapter 11
Debtor.	Case No. 02-31674

BERGER TRANSFER & STORAGE, INC'S RESPONSE TO
STEERING COMMITTEE'S SECOND OMNIBUS OBJECTION TO CLAIMS

TO: Those parties specified in Local Rule 9013-3(b).

COMES NOW Berger Transfer & Storage Inc. ("Berger") by and through its undersigned counsel, and files this Response to the Steering Committee's Second Omnibus Objection to Claims:

PROCEDURAL POSTURE

Berger properly filed proof of claim number 118 for $115,335.53 (hereafter "Claim 118"), and inadvertently filed the same claim again (hereafter "Claim 660"). In its First Omnibus Objection to Claims dated June 29, 2004 the Steering Committee objected to Claim 660, which Berger agreed was a duplicate and could be disallowed. Berger consequently did not file a response to the First Omnibus Objection to Claims, and Claim Number 660 should therefore already have been disallowed.

The Steering Committee's Second Omnibus Objection to Claims appears to object to both of Berger's claims as 1) duplicative, 2) not listed on the Debtor's schedules and therefore not owing, and 3) appropriate for disallowance since Berger has not returned allegedly

preferential payments to the estate. The final argument will be addressed despite the fact that Berger is not listed on the schedule identifying those claims to which this argument applies. [1]

Berger received a demand letter from Alliance Management Inc. dated March 12, 2004, demanding the return of allegedly preferential payments in the amount of $10,428.53. Berger duly replied to the letter, contesting the nature of the transfers as preferential. After a series of agreements, the Tolling Period was most recently extended to September 30, 2004 to permit the Committee to review the nature of the subject transfers. To date no complaint against Berger alleging that Berger received any preferential payments has even been filed, and certainly there has been no judicial determination that Berger received any voidable preferences.

FACTS

Berger is a motor carrier specializing in household goods moves. As a matter of course it is frequently engaged by companies desiring to arrange and pay for the moves of their officers and/or employees. Here, Berger did business with Sheldahl for many years. Its Claim 118 represents moving services related to the following Sheldahl moves:

BL number	Date	Sheldahl employee	Amount owing
64475	12/17/00	Shepard, Timothy	$ 8,846.21
10050429	07/02/01	Dixon, John	$ 742.61
10048038	07/30/01	Ringgenberg, Bret	$ 6,937.93
10041100	08/02/01	Dixon, John	$ 4,974.58
10054221	08/02/01	Stiles, John & Karen	$ 8,427.93
10060779	08/02/01	Dixon, John	$ 742.61
10061109	08/03/01	Stiles, John	$ 3,128.28
10060686	08/21/01	Dixon, John & Terry	$ 770.00
40608	08/28/01	Dixon, John & Terry	$ 4,645.53
10069498	09/12/01	Huettl, Anthony	$29,575.78

[1] Berger's claims are listed only on Exhibit B, which sets forth claims to be disallowed as unsupported by the Debtor's schedules. However, the comment on Exhibit B states that the claims are duplicative, and that the Committee also seeks to disallow them pursuant to Section 502(d). Berger believes that the Committee has not properly objected to Berger's claims based on 11 U.S.C. § 502(d), but in an abundance of caution is addressing the argument.

10078553	10/01/01	Rutt, Jim	$ 125.71
20000437	01/02/02	Rutt, Jim	$ 130.20
10080443	02/04/02	Ringgenberg, Bret	$ 94.88
65909	02/14/02	Norwood, Greg & Juli	$ 3,456.60
20015719	03/01/02	Stiles, John	$ 100.00
10072668	03/11/02	Parsons, Ralph	$19,402.04
20023143	04/01/02	Rutt, Jim	$ 130.20
10034746	05/17/01	Zhang, Bin	$ 8,995.50
10034844	06/06/01	Gohlke, Owen & Tracey	$ 7,054.47

A summary was properly attached to the Proof of Claim. In addition, copies of all of the relevant bills of lading were provided to attorney Heather Thayer at Fredrikson & Byron (Debtor's counsel) by letter dated August 27, 2002, and on other occasions. Evidence supporting the Claim has been provided the Debtor and is in its files and that of its counsel.

ARGUMENT

As briefly noted above, the Steering Committee makes three arguments with respect to Berger's claims numbered 118 and 660. First, it argues that the claims are duplicative, and further that Claim 660 was late filed. Inasmuch as Berger admits these allegations and has already agreed that Claim 660 may be disallowed, all references hereafter to the "Claim" are specifically to Claim 118 only.

Second, the Steering Committee summarily argues that the failure of the Debtor to schedule the liability to Berger proves that the Debtor had no liability to Berger. This argument is addressed below.

Finally, in its comment on Exhibit B to the Objection the Steering Committee argues that the Claim should be disallowed because Berger failed to return allegedly preferential payments. This argument must fail for the following independent reasons, which will be addressed in greater detail in the body of this section:

1. No determination that the transfers were in fact preferential has been made, and until such a determination is made the Claim cannot be disallowed.

2. The alleged transfers were not in fact preferential, as the elements of 11 USC Section 547 cannot be met.

I. OMISSION FROM THE DEBTOR'S SCHEDULES IS NOT A DETERMINATION OF LIABILITY

While the Steering Committee is correct when they state that 11 U.S.C. § 105 defines "claim as a "right to payment. . ." nowhere does it state that being listed on the debtor's schedule is a required element of this right. In fact, such a suggestion is completely circular and logically invalid. According to the Steering Committee, valid debts are placed upon the creditor schedule, which are valid by nature of their being placed upon the schedule. If this were the case, any party filing for bankruptcy relief could conveniently eliminate debt by intentionally omitting various creditors from the bankruptcy schedules.

While the Steering Committee cites no authority for this proposition other than the statutory definition of "claim", the plain language of the Fed. R. Bank. Pro. further demonstrates the absurdity of this argument. Fed. R. Bank. Pro. 3003(c)(2) states that "[a]ny creditor or equity holder whose claim or interest is *not scheduled* . . . shall file a proof of claim or interest . . ." [emphasis added]. According to the Steering Committee's argument, such a proof would be unnecessary (and even pointless) since omission from the schedules had already eliminated the creditor's debt.

Berger has a valid claim, duly supported by not only the documents in the Debtor's possession and files, but also by the bills of lading and other proof provided to Debtor's counsel on many occasions.

II. AS IT STATES, SECTION 502(D) APPLIES ONLY WHERE THE CREDITOR "IS" LIABLE.

A. 11 USC Section 502(d) requires that liability have been determined, not merely asserted.

The Steering Committee devotes a mere eight (8) lines to its argument that Section 502(d) of the Bankruptcy Code mandates that Berger's Claim be disallowed. A reading of the section, even as summarized in the Objection, shows that Section 502(d) does not stand for the proposition asserted and that this reliance is misplaced:

> "The court shall disallow any claim of any entity … that is a transferee of a transfer avoidable under section …547… unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee **is liable**…." [emphasis added].

Section 502(d) requires that a determination of liability has been made. The preference action must be commenced, the creditor given its opportunity to defend, and a judicial determination made before Section 502(d) has any applicability. In this case, the Steering Committee cannot simply assert that Berger received a preference and in so asserting make it so.

The Supreme Court, in analyzing Section 57(g) of the Bankruptcy Act of 1898, forerunner of Section 11 U.S.C. 502(d), recognized that "by the very terms of the [Bankruptcy] Act, when a bankruptcy trustee presents a Section 57(g) objection to a claim the claim can neither be allowed nor disallowed until the preference matter is adjudicated." Subsequent courts, including the 8th Circuit Court of Appeals, agree with this understanding of the language of Section 502(d):

> The language of section 502(d) expressly provides that the entity's claim is not disallowed if the entity or transferee "paid the amount, or turned over any such property for which such entity or transferee is liable." 11 U.S.C. § 502(d). This language indicates section 502(d) should be used to disallow a claim *after the entity is first adjudged liable* . . . The [petitioners] do not possess judicial orders requiring turnover of voidable transfers, and section 502(d) does not provide affirmative relief. In re Odom Antennas, Inc., 340 F.3d 705, 708 (8th Cir. 2003) [emphasis added].

> The Court concludes that the use of 11 U.S.C. § 502(d) cannot be unfettered. The allegation of a preference alone cannot act to defeat a claim against a debtor. A determination is needed on the preference matter. In re Southern Air Transport, Inc. 294 B.R. 293, 296 (Bkrtcy.S.D.Ohio 2003).
>
> Courts have consistently recognized that when an objection to a claim is based upon the ground that the claimant has failed to surrender a voidable transfer, "the claim can neither be allowed nor disallowed until the preference matter is adjudicated." In re Coral Petroleum, Inc., 60 B.R. 377, 382 (Bkrtcy.S.D.Tex. 1986).
>
> [B]y the very terms of Section 502(d), when the trustee objects to a claim upon the ground that the claimant has failed to surrender a voidable transfer, the claim can neither be allowed nor disallowed until the validity of the transfer is adjudicated. In re Independent Clearing House Co., 41 B.R. 985, 1017 (Bkrtcy.Utah 1984).

It is clear that mere allegations of a preferential transfer are insufficient to defeat a creditor's claim. Assertions and averments do not equal adjudication. Berger must be given an opportunity to be heard on the matter.

B. In Fact, Berger Did Not Receive Any Preferential Payments From the Debtor.

Not only is a determination lacking, but the facts surrounding the allegedly preferential payments prove that no determination of liability can be made.

The payment of $10,428.53 was for transportation and storage with respect to services ordered by Sheldahl and provided to Owen and Traci Gohlke. Mr. & Mrs. Gohlke's goods were moved by Berger from Colleyville, Texas to Berger's warehouse in Roseville, Minnesota, and then several months later to Lakeville, Minnesota. The initial move took place on June 5, 2001, and storage charges began to accrue upon the arrival of the goods in Minnesota. When the Gohlkes requested delivery of their goods in March of 2002, a dispute arose over payment of the existing charges, at that time totaling $15,013.04. Yet to be billed were charges for insurance (on goods valued at $48,700), March storage, and the delivery fees, all of which totaled $2,459.35. Prior to delivery the parties agreed to a reduction of the $15,014.04 existing bill to

$7,969.17, and a wire transfer of this payment was made to Berger on March 7, 2002 (the "First Wire"). On the same day, a wire transfer of $2,459.35 (the "Second Wire") was made to Berger representing a prepayment for the March storage of $462.65, the insurance of $243.50, and the delivery charges of $1753.20. The goods were subsequently delivered to the Gohlkes on March 11, 2002.

11 USC Section 547 provides that a payment is preferential if, among other things, it is made on account of an antecedent debt [Section 547(b)(2)], and it enables the creditor to receive more than it would have received in a Chapter 7 case had the debtor instead filed for relief under Chapter 7 [Section 547(b)(5)]. As to the Second Wire, the payment represented thereby was a prepayment for services not yet rendered, and the payment therefore was not made on an "antecedent debt". A prepayment cannot be preferential, and the Second Wire therefore cannot be preferential payment.

As to the First Wire, this transfer represents a payment for transportation and other charges already incurred by the shipper. While it was therefore a payment on an antecedent debt, it is the fifth element of Section 547(b) that cannot be met by the Steering Committee – since Berger was a secured creditor with an interest in goods worth in excess of $48,000, when it released the goods in exchange for the payment of $7,969.17 it did not receive any more than it would have had Sheldahl instead filed a Chapter 7 case. The goods were subject to Berger's statutory warehouse lien, set forth in Minn. Stat. Section 336.7-209 et seq., and this lien existed regardless of the filing of a Chapter 7 or Chapter 11 case. At all times relevant hereto, Berger was entitled by law to look to the household goods it held in its warehouse for payment of the charges related thereto.

For these reasons, the transfers to Berger will not be found to be preferential.

CONCLUSION

For all the reasons stated above the Steering Committee's objection to the Claim should be dismissed, and Berger's Claim Number 118 should be allowed as filed.

Dated: September 21, 2004

KALINA, WILLS, GISVOLD & CLARK, P.L.L.P.

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CERTIFICATE OF SERVICE

Mary E. Hartin, in the State of Minnesota, under penalty of perjury, certifies that on the 21st day of September, 2004, she served Berger Transfer & Storage, Inc.'s Response to Steering Committee's Second Omnibus Objection To Claims on the Defendants by placing a copy thereof in an envelope and arranging for the deposit of same by United States mail, postage prepaid, in the United States mails at Brooklyn Center, Minnesota, addressed to each of the persons listed as follows:

Sheldahl, Inc. Steering Committee
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Unsecured Creditors Committee
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Minneapolis, MN 55415

/e/ Mary E. Hartin
Mary E. Hartin.